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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 773

JACK ESCOE, PETITIONER

v.

FRED G. ZERBST, WARDEN OF THE UNITED STATES Penitentiary at Leavenworth, Kansas

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The order of the District Court for the District of Kansas, denying a motion to dismiss the petition for writ of habeas corpus and denying the writ, appears at R. 20. The opinion of the Circuit Court of Appeals (R. 28–36) is reported in 74 F. (2d) 924.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 7, 1935 (R. 37). A petition for rehearing was denied February 12, 1935 (R. 38). The petition for the writ of certiorari was

filed in this Court March 9, 1935, and was granted April 1, 1935 (R. 39). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether it is necessary that petitioner be brought personally before the court before proceedings could be had to revoke his probation and order his commitment.

2. Whether failure to grant such a hearing before commitment justifies the issuance of a writ of habeas corpus.

STATUTES INVOLVED

The pertinent statutory provisions will be found in Appendix A, *infra*, pp. 35–39.

STATEMENT

The petitioner, Jack Escoe, was indicted in the Eastern District of Texas for violation of the National Motor Vehicle Theft Act (R. 4), on October 4, 1932, pleaded guilty (R. 5), and on October 10, 1932, the petitioner was sentenced to a term of four and one-half years in the penitentiary at Leavenworth, Kansas (R. 5). On the same day, October 10, 1932, the said sentence was suspended for a period of five years on conditions of probation,[1] and the petitioner was placed in charge of the Probation Officer for that District for that length of time (R. 6, 17).

[1] A form of the Conditions of Probation is printed as Appendix B hereto, *infra*, p. 41.

By agreement of counsel at the time of the hearing before the Circuit Court of Appeals certain documentary evidence as to the reasons for the revocation of probation were inserted in the record. There, therefore, appears therein a letter of July 27, Oscar Gresham, Probation Officer (R. 10); letter from Oscar Gresham, Probation Officer, to A. Escoe, father of petitioner (R. 11); letter of July 30, 1933, written by A. Escoe and Mrs. Escoe, father and mother of petitioner, to the Probation Officer (R. 12), and letter of July 31, 1933, Probation Officer, to Mr. A. Escoe, father of petitioner. (R. 13).

From the letters sent to the Probation Officer by the petitioner's parents it would appear that the Probation Officer had evidence of violation in that the petitioner had been drunk four or five days and had forged two checks. In the second letter the names of the payee of the two checks for $10 and $15 were given, the father stating that his name had been forged to both of these checks (R. 12). The contents of these letters were duly communicated to the court (R. 16, 17, 18).

On July 29, 1933, the Probation Officer made application to the District Court to revoke the probation of the petitioner (R. 14), and the court ordered capias for the arrest of the defendant and his delivery to the Probation Officer (R. 15), which was executed on August 4, 1933 (R. 16).

On August 5, 1933, the report of the Probation Officer was filed with the District Court, with

which a motion was filed asking the court for an order revoking the suspended sentence of the petitioner (R. 16 17), and on August 5, 1933, the Judge of the District Court issued a committment ordering the Marshal to forthwith deliver the petitioner to the Warden of the Leavenworth Penitentiary (R. 18 19). The return of the Marshal indicates that on August 12, 1933, said petitioner was delivered to the Warden of the Leavenworth Penitentiary (R. 19).

It is true that these documents do not show that petitioner was personally brought before the court at the time the matter of the revocation of probation, and his arrest therefor, were under consideration by the court.

The petitioner contended in his petition for writ of habeas corpus (R. 1) that because he was not personally brought before the court at the time when the revocation of his probation was under consideration he was entitled to be discharged from further confinement in the penitentiary. He did not pray that he be taken back to the District Court and be given a hearing on the revocation of his probation.

Motion of the respondent to dismiss the petition for writ of habeas corpus was denied, and the respondent filed an answer setting out copies of the record already referred to. After a hearing on the response to the petitioner and the reply to the response, the court denied the petition for writ of habeas corpus (R. 20).

The petitioner duly filed his petition for appeal on March 27, 1934 (R. 22), alleging, in the assignment of errors (R. 23), that the District Court erred in ruling that probation could be revoked without opportunity for hearing. The Circuit Court of Appeals for the Tenth Circuit in its opinion rendered January 7, 1935 (R. 28), affirmed the judgment of the District Court in the following language (R. 34, 35):

> It will be noted that the statute does not lay down any rule of procedure respecting either the granting of probation, the suspension of sentence, or the revocation of orders of probation or of suspension of sentence. It does provide that on arrest the probationer shall forthwith be taken before the court, presumably for the purpose of hearing and disposing of pending accusations. It is elementary and fundamental of course that no one accused of wrongdoing should be condemned in his absence and without opportunity for defense, but in view of the broad provisions of the Probation Act it does not necessarily follow that the failure to have appellant present in court and to afford him opportunity to answer the accusations made against him by the probation officer rendered the order of August 5th void; the court did not pronounce the sentence which appellant is now serving on that day; that sentence had been previously pronounced on October 10, 1932, when he was present. At that time and pursuant to the probation statute the sentence then pro-

nounced was suspended and appellant was placed on probation for five years under the conditions specified in the application for revocation later filed by the probation officer. It is clear that the court had authority on August 5th to revoke the probation order, including the suspension of sentence made by it on October 10, 1932. It had continuing jurisdiction after that date of both the case and of the person of appellant in respect to his probation. On August 5th and at the time the order revoking the suspension of sentence was made appellant was under arrest and in the custody of the United States marshal on a warrant issued at the direction of the court. It is apparent from the record that at the hearing on August 5th testimony and evidence in support of the charges made by the probation officer were taken and considered by the court, and that upon the evidence and testimony so taken the order revoking probationer's sentence was made. If the evidence so taken was untrue and the revocation of his probation and suspension of sentence unfair and unjust, the probationer long ago could have applied to the court for a rehearing upon a proper showing made and the injustice corrected. The fact that he has never made such application tends to show that he actually has no real cause for complaint. Instead of pursuing this course he has chosen to invoke the high and privileged remedy of habeas corpus and is now asking this court to read into the Probation Act of Congress a rule of crimi-

nal procedure which would make the order of August 5th absolutely void. In this period of enlightened procedural liberalization it may not be supposed that Congress intended to or that the courts will by construction weigh down and encumber the Probation Act of Congress with the outworn technicalities of the old criminal-procedure.

SUMMARY OF ARGUMENT

In the exercise of that discretion so necessary to the proper functioning of the probation system the Judge, after an investigation of the facts, ordered the revocation of probation and put the original sentence into effect. The defendant has had his day in court, his sentence originally imposed has not been increased and he cannot be heard to complain at its imposition. He has had due process of law in the trial of the original case.

No substantial rights of the petitioner have been invaded. According to his petition for certiorari he employed counsel, who had eight days to communicate with the court between date of arrest and commitment. The opportunity was open to him to ask for reconsideration by the trial judge, stating through his attorney or in writing, his side of the case.

The court had jurisdiction to make the order of revocation and there was no abuse of the discretion vested in the court. In many cases a hearing is no doubt advisable but to rule that a hearing is a *sine qua non* which *must* precede every revocation would give rise to many unmeritorious appeals and seri-

ously hamper the administration of the Probation Act.

Even if there were merit in the petitioner's contention habeas corpus is not the proper remedy.

ARGUMENT

I

PROBATION IS A MEANS OF SOCIAL ADAPTATION

In order that probation may be an effective instrument in the treatment of the reformable type of criminal it is important that the trial courts should be left free to administer it promptly and expeditiously and it would not seem to be in the public interest to hamper its administration with many of the restrictions which must of necessity surround the more formal occasion when the guilt or innocence of the defendant is under consideration.

On both of the two occasions heretofore when the construction of the probation statute (Secs. 725, 726, Title 18, U. S. C., 43 Stat. 1259) was under consideration, first in the case of *United States* v. *Murray*, 275 U. S. 347, and second, in the case of *Burns* v. *United States*, 287 U. S. 216, the need for flexibility in the operation of the Act was definitely recognized by this Court.

Although delayed by the decision in the *Killits Case*, 242 U. S. 27, until the passage of the appropriate statutes in 1925, 1930, and 1933, Federal probation has had rapid and satisfactory development.

Reports of the Department of Justice reflect that there are now 114 duly qualified probation officers and 79 clerks engaged in the work of investigation preparatory to sentence and supervision of conduct during the term of probation. As compared with 18,385 undergoing sentence at the end of the fiscal year (June 30) of 1933, there were 30,870 Federal offenders on probation. A large percentage of those *taken* on probation were prohibition violators (81.9 percent) and while, owing to the shorter sentences the proportion of this type of offender *carried* on probation was not as large as this, nevertheless, this group accounts for more than a majority of those on probation in the Federal courts. The expected decrease in the number of probationers carried is therefore now being noted.

On April 12, 1935, approximately 17,000 offenders were under probation supervision, as compared to 14,796 prisoners in Federal institutions and 5,821 Federal prisoners in local jails, a total of 20,617.

In spite of the heavy case load surprisingly gratifying results have been reported. During the fiscal year 1934 there were—

On probation at beginning of year	30,870
Taken on probation during the year	8,583
On probation at end of year	22,926
Discharged from probation during year	16,627
Probation revoked for violation	868

See Attorney General's Report for the year ended June 30, 1934, p. 207.

These figures would seem to bear out the statement made in the Report of the Committee of the Judiciary at the time the Probation Act was under consideration (House Report No. 1377, 68th Cong., 2d Session):

> The result of long experience with the probation system shows that it is far easier to reclaim an unhardened early offender without commitment to a prison than after it.

The decisions in the *Murray* and *Burns* cases, *supra*, with opinion in each instance by the Chief Justice of this Court, have been the only two since its enactment in which the provisions of the statute were directly in issue. These clear and humane interpretations of the law and the progressive expositions of the theory of probation contained therein have firmly established this modern penal device as one of the most scientific and effective weapons in our defense against crime, and have aided in its wise utilization by our Federal judges.

In *United States* v. *Maisel*, 26 F. (2d) 275, 276 (S. D. Tex.), the court felt that:

> The statute in effect has accomplished at one stroke for the federal courts the redramatization of the criminal law. * * * And so at last there is set up in the criminal laws of the United States a statute to equalize and correct that wherein, by reason of its universality, the criminal law is deficient, under which the court may straightforwardly, and as upon obligation to do justice, be governed by the equitable considerations

> which arise out of and inhere in the particular case, and dispose of the prisoner accordingly, * * *.

The grant of probation is everywhere referred to as a matter of grace rather than of right. *Campbell* v. *Aderhold*, 36 F. (2d) 366 (N. D. Ga.), contains a typical statement to this effect and it may be said to represent the recorded attitude of both State and Federal courts toward the granting of probation.

Probation is defined in *Santis* v. *Esola*, 50 F. (2d) 516, 517 (C. C. A. 9th), as follows:

> "Probation" simply means enlarging a person subject to commitment by suspension of sentence, during the regularity of conduct, and imposing conditions, and on default thereof arrest and commit until imprisonment is served or the judgment is satisfied.

In *Evans* v. *District Judge*, 12 F. (2d) 64 (C. C. A. 6th), the court said:

> In our judgment the act does not contemplate that requests to be put on probation should be the subject of formal applications, hearings, and orders, until there may be an order granting. We think, rather, that the power is to be exercised by the court upon its own motion, and only as a matter of extraordinary grace justified by extraordinary circumstances. The exercise of the power is plainly and purely discretionary. If probation is refused, it cannot concern this court whether the reason for the refusal is good or bad. Doubtless the District Courts

will permit suggestions on the subject, in cases where the matter has not been fully considered in imposing sentence; but they cannot permit formal or extended hearings without assuming a burden which would be very great, and which we do not believe was intended by the statute.

II

AND ITS ADMINISTRATION IS NOT A MATTER OF FORMAL PROCEDURE

If the court in the exercise of its discretion under the probation statute is to be left entirely free to work out the reformation of certain offenders by *placing* suitable cases upon probation, it is, *a fortiori*, important that unnecessary formalities should not stand in the way of the prompt action of the court and the probation system to *revoke* the granting of this favor without delay and in the public interest.

As stated by the court in *Moss* v. *United States*, 72 F. (2d) 30 (C. C. A. 4th), it would seem that "if probation was granted to the defendant in the pending case, the actions of the court on November 28 and December 4, 1933, might be considered a valid revocation thereof, since revocation of probation is not a matter of formal procedure either with respect to notice or specification of charges or trial thereon."

See also: *Furrow* v. *United States*, 46 F. (2d) 647 (C. C. A. 4th); *Riggs* v. *United States*, 14 F. (2d) 5, 9, 10 (C. C. A. 4th); *Dillingham* v. *United States* (C. C. A. 5th), decided March 7, 1935.

III

THE PETITIONER WAS NOT ENTITLED AS OF RIGHT TO BE PERSONALLY PRESENT IN COURT AS A PREREQUISITE TO A REVOCATION OF HIS PROBATION

A revocation of probation without giving the probationer an opportunity to be heard apart from direct statutory provisions does not contravene the constitutional requirement for due process of law.

The determination of the guilt or innocence of the accused around which the Constitution has placed certain safeguards is not in issue where revocation of probation is proposed. The defendant has had his day in court, with the right to jury trial and appeal; and a later revocation of probation as to a sentence which was suspended for his benefit does not endue him with any new or additional right or constitutional right. The infliction of the penalty which he accepted has been merely postponed on terms satisfactory to him, to be reimposed subject to the judgment of the court. See *Finer* v. *Commonwealth of Massachusetts*, 250 Mass. 493, *infra*. In fact, see *Weber* v. *State*, 58 Ohio St. 616; 51 N. E. 116, which states, "The suspension being in favor of the prisoner, is for his benefit, and is valid whether consented to by him or not."

Where he is threatened with the revocation of his probation he is not being placed on trial for the commission of a new offense or solely for his failure to abide by the rules of his probation, but he is to be punished for the original offense, on the trial of which original offense all of his constitutional safe-

guards were preserved to him. See *Darrow* v. *United States*, 46 F. (2d) 647 (C. C. A. 4th); *Campbell* v. *Aderhold*, 30 F. (2d) 306 (N. D. Ga.); *Riggs* v. *United States*, 14 F. (2d) 5, 9, 10 (C. C. A. 4th).

The instant case is not in the class discussed in *Frank* v. *Mangum*, 237 U. S. 309.

There the majority of the court held that the voluntary absence from the court room of the defendant and his counsel did not invalidate the verdict rendered against him.

Even Holmes, J., in rendering a dissenting opinion on that phase of the habeas corpus appeal which had to do with mob domination in the course of the trial, said (p. 346):

> * * * we never have been impressed by the argument that the presence of the prisoner was required by the Constitution of the United States.

In our case defendant pleaded guilty and *was* present at all stages up to and including sentence.

While there is one Federal court case and a number of cases in our state courts which seem to hold that as a matter of law a probationer is entitled to hearing before revocation, there are decisions which hold to the contrary.

Couture v. *Brown*, 82 N. H. 459, 461; 135 Atlantic 330. In that case, which was a petition for writ of habeas corpus, the sentence of the court was as follows: "Fine of $100 and thirty days in jail, jail sentence suspended on payment of fine and

costs; mittimus to issue on call of county solicitor." Within the thirty day period, on the request of the solicitor, a mittimus was issued in compliance with this request, without notice to petitioner and without hearing. The court stated:

> The petitioner was not entitled as of right to any indulgence whatever. The stay of sentence was a favor to him, and having accepted that favor he cannot now be heard to say that the condition on which it was granted is invalid.

The Supreme Court of Iowa in *Pagano* v. *Beehly*, 211 Ia. 1294; 232 N. W. 798, 799, 800, under a statute which read, "a suspension of a sentence by the court * * * may be revoked at any time, without notice, by the court or judge, and the defendant committed in obedience to such judgment", in annulling the writ of certiorari, said:

> * * * being a matter of grace and forbearance on the part of the sovereign, the defendant acquired no vested rights, and therefore, under the statutory provisions, he would not be entitled to notice and opportunity to be heard.

See also *People* v. *Goodrich*, 149 N. Y. Supp. 406, 412, in which the court said:

> I think the suspension of judgment in this case was a matter of grace, not of right, to the defendant, that she thereby acquired no vested rights, and the court had the right in its discretion to cancel and revoke the same.

> In any event, all that was required was to call to its attention facts that satisfied the conscience of the court that the defendant had violated the terms of her parole.

See also *People* v. *Trombly*, 173 App. Div. 497; *People* v. *Dudley*, 173 Mich. 389; *Commonwealth* v. *Fox*, 69 Pa. Superior Ct. 456; *City of New York* v. *Kriegal*, 207 N. Y. Supp. 646.

The only Federal case which passed upon the question of notice to the probationer is *Hollandsworth* v. *United States*, 34 F. (2d) 423 (C. C. A. 4th). The court observed in the course of its opinion, which affirmed the judgment of the District Court denying the appeal of the plaintiff for discharge, that the probationer "may not be sentenced until he has been given notice of the specific charge and an opportunity to be heard in his defense, and until the court, upon hearing, shall have judicially determined that his conduct during the probation period has not conformed to the course outlined in the order of probation."

This observation seems to have been unnecessary to the conclusion reached, which was that the defendant had suffered no injury from the omission of the terms of probation from the formal order of the court. See *Commonwealth* v. *McGovern*, 183 Mass. 238.

This *dictum* should be considered in connection with a later observation of the same judge, Soper, in *Moss* v. *United States, supra*,—"* * * since revocation of probation is not a matter of formal

procedure, either with respect to notice or specification of charges or trial thereon."

The leading case in the state courts cited by the petitioner is *State* v. *Zolantakis*, 259 Pac. 1044, 1047. This was a three to two decision and the language of Mr. Justice Cherry in the dissenting opinion is as follows:

> When the execution of a sentence is suspended, it is not vacated. The judgment itself is not impaired or limited. The time for its execution is merely deferred. While under a suspended sentence, a duly convicted person is not freed from the legal consequences of his guilt. He is merely enjoying a conditional favor, postponing his punishment, which may be withdrawn. *When the suspension is revoked the convict is punished for the crime of which he was convicted, and not for violating the terms of his parole.* The suspension of a sentence can never be demanded as a matter of legal right. It is granted at the mere will of the court. When granted, it is not held as a vested right, but as a matter of favor or grace. The statute confers upon courts a discretionary power designed to aid in the reformation and reclamation of convicted persons. By impressing upon the convicted person that he is enjoying a contingent favor, which may be withdrawn or revoked at any time, it is sought to induce or coerce him to amend his ways. The whole force and virtue of the expedient lies in the reserved power of the court to re-

voke the favor and inflict the penalty. *And if this is hedged about with limitations which substantially destroy it, the whole scheme is defeated.*

* * * * *

In the case before us it is not claimed that the court abused its discretion or acted capriciously or arbitrarily by making the order complained of without sufficient grounds, nor that on the merits the defendant has suffered any substantial injustice. In view of the facts proved, which were not even denied by the appellant, that claim could not be successfully made. The complaint is merely that the court committed error in its procedure.

In exercising the powers conferred by the statute in question from the nature of the subject, courts must necessarily have a large discretion not only in respect of the grounds upon which they act, but in the method or procedure by which they ascertain facts and arrive at conclusions. They are not dealing with specific legal rights and are not bound by the standards of legal procedure which usually control judicial proceedings. This is comprehended within the very generally approved rule that an order suspending sentence may be revoked without granting the defendant a trial upon the facts. It logically follows that courts may ascertain facts upon which to act in any manner they see fit, and act upon them, provided only that their proceedings and conduct on the whole

> are not capricious or arbitrary or a manifest abuse of discretion. (Italics ours.)

The respondent might well say, as did the Court in *Miller* v. *Aderhold*, 288 U. S. 206, 210: "The decisions on the point are in conflict. The greater number support the view of petitioner; but we are of opinion that the weight of reason is the other way."

The provision of Section 725, Title 18, U. S. C., in question may be construed as directory and not mandatory and failure to personally take the probationer before the court did not make invalid his commitment to the penitentiary.

"Thereupon such probationer shall forthwith be taken before the court."[2]

Is it not as consistent to argue that this language means merely that the probationer's case must be taken up and considered by the court as it is to read into the statute the language which petitioner seems to attempt to do, namely, that he must be given the right to be heard or to speak himself or by counsel before the court? Can he not be there by virtue of proper proceedings brought to revoke his probation, or does he have to be there personally? If he has to be there personally, what other right can he demand? Is he entitled to postpone

[2] Respondent makes no contention that the amendment of 1933 had the effect to eliminate these words from the statute. The official copy indicates that the first sentence only of the second paragraph of Section 2 was to be replaced, thus leaving the remaining sentences of paragraph 2 of Section 2 as they were formerly.

the hearing? Must bail be furnished during such postponement? (*Pritchett* v. *United States*, 67 F. (2d) 244 (C. C. A. 4th.) Is he entitled to summon witnesses in his defense? May he claim a trial by jury?

Nothing appears in the record to explain why the petitioner or his counsel did not request an opportunity to deny the facts alleged by the probation officer during the eight days intervening between revocation of probation and petitioner's commitment to the penitentiary. If he had formally requested and obtained a hearing, would the court be obliged to listen to him if in its discretion it felt this to be unnecessary?

It is admitted in the petitioner's brief that he had counsel at the time he was held in jail. Could not some written or verbal statement have been filed during that period if there was anything about which he wished to inform the court?

The trial judge upon ordering a revocation of probation need not act, according to the *Burns* case, *supra* (287 U. S. 223), as though the case was "one of formal procedure, either with respect to notice or specification of charges or a trial upon charges. The question is simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles governing the exercise of judicial discretion."

In the case of *Dillingham* v. *United States*, decided March 7, 1935, by the Circuit Court of Appeals for the Fifth Circuit, Judge Hutcheson,

in affirming the judgment of revocation of probation, stated:

> It is claimed, too, that the revocation followed a hearing inadequate as to procedure and proof. * * *
>
> It is not necessary that all of the conditions of probation be set out in the sentence, nor are formal hearings and formal procedure necessary to a revocation of probation. It is sufficient that it be made sufficiently to appear that the probationer has not conducted himself in accordance with his duty as a probationer. *Burns* v. *United States*, 287 U. S. 216. But if formal charges and formal proceedings were necessary, they were sufficiently had here, for he was brought before the judge on a complaint filed by the probation officer.

There is probably no State in which probation has been more fully developed and under more scientific auspices than in the Commonwealth of Massachusetts. It has been repeatedly pointed out that while there are several times as many persons on probation in Massachusetts as there are serving terms in prison, the crime rates in that State compare favorably with other States in the Union. See—

1. Report of Commissioner of Correction for the State of Massachusetts, 1933.

2. National Committee on Law Observance and Enforcement (Wickersham Committee) Vol. 9.

3. Proceedings, Attorney General's Crime Conference, Washington, D. C., December 1934. (Does Conviction Mean Punishment, by Joseph P. Murphy.)

4. Probation and Criminal Justice, a symposium edited by Sheldon Glueck.

5. Hearing before a Subcommittee of the Committee on the Judiciary of the United States Senate on S. 1042 and S. 1729, 68th Cong., 1st Sess., Feb. 21, 1924. "Probation System in United States Courts," p. 24.

That the wise use of probation is consistent with public safety is also reflected in our reports of arrests, convictions, and crimes known to the police. See—

1. Prisoners in State and Federal Prisons and Reformatories, 1931–32, U. S. Department of Commerce, Bureau of the Census, pp. 4, 5, 6.

2. Uniform Crime Reports issued by Federal Bureau of Investigation, Fourth Quarterly Bulletin, 1934, p. 10.

The State of Massachusetts recently celebrated the fiftieth anniversary of the birth of probation and the wise decisions of the Supreme Court of Massachusetts have played a considerable part in the development of a sound protective system. Two cases decided by the Massachusetts Supreme Court seem to be directly in point on the question as to the construction of the phrase under consideration in this case.

In *Commonwealth* v. *McGovern*, 183 Mass. 238, 240, the statute *required* that a person released on probation shall be furnished by the probation officer with a written statement of the terms and conditions of his release. Upon later revocation of probation the defendant pleaded in bar that he could not be sentenced on the complaint. The judge overruled the plea and in dismissing the defendant's exceptions, Judge Braley used the following language:

> But while the course of the probation officer in the case at bar in not furnishing a written statement to the defendant, and in surrendering him without apparently making an independent investigation to determine whether the information received was true, or furnished a sufficient foundation to justify such action on his part, cannot be commended, *and was not in accordance with the requirement or purpose of the statute,* it does not follow that the defendant's exceptions are well taken. (Italics ours.)

In a later case, *Finer* v. *Commonwealth*, 250 Mass. 493, 497, Mr. Chief Justice Rugg, in dismissing the writ of error, used the following language:

> *Failure to conform to the statute* with respect to stating the period of probation *does not affect the substantial rights of the plaintiff in error* * * *. He is not entitled to be discharged from custody. It does not affect the validity of his sentence or his commitment in execution thereof.

> *His original sentence was valid. If he was dissatisfied with it, he had opportunity for appeal before the suspension of his sentence.* After accepting the advantage extended to him by the law solely for his benefit, he could no longer ask for revision of it or complain of its terms. (Italics ours.)

See also the Hearing before a Subcommittee of the Committee on the Judiciary of the United States Senate, 68th Congress, 1st Sess. on S. 1042 and S. 1729, February 21, 1924, in which it is stated on page 26:

> The Bill is modeled on the best provisions for adult probation in force in the States of New York, Massachusetts, and other States having successful probation work.

In *United States* v. *Lecato*, 29 F. (2d) 694, 695 (C. C. A. 2d), the court said:

> When Congress passed the Probation Law it must be understood to have intended the system so established to be construed in the same sense as it had been in the states from which it was borrowed.

It may have been better if the Government could show in the instant case that the trial judge had insisted that the defendant be brought before him personally, even though he considered it a formality. If the language of the statute is construed to mean that a hearing must be granted and that the requirement for a hearing could not be satisfied except by the personal appearance of the peti-

tioner, then it could still further be found that the court's failure to do this was not fatal, did not affect the substantial rights of the petitioner and can be taken into consideration only as evidence bearing upon the question of judicial discretion. The record discloses the fact that information was brought before the court sufficient to justify the judge in the exercise of a reasonable discretion in revoking the petitioner's probation.

The revocation of probation is the putting into effect of the punishment meted out for the original offense and not for the acts which constitute the violation of probation. See *Jianole* v. *United States*, 58 F. (2d) 115 (C. C. A. 8th), where a refusal to grant continuance in proceedings to vacate probation until termination of another criminal prosecution involving same grounds was held not erroneous.

The weight of authority is to the effect that the whole purpose of probation, with its possibility of prompt revocation, is to keep the probationer alive to the importance of comporting himself with rectitude. In fact, a higher degree of good conduct may well be exacted from him by reason of the reprieve which has been given to him in the way of a suspended sentence. No matter how trivial the violation in comparison with the original crime, the question for the committing judge to determine is whether the circumstances are such that the original punishment should be imposed and not the

degree of guilt or the seriousness of the violation. This must be so in order to justify the repeated statements about the discretionary powers of the court and the need for informality.

The Probation Act, it is submitted, should be construed in a way to facilitate the protection of the public as well as the reformation of the prisoner. If each probationer, instead of being duly impressed with the certainty that the suspended sentence, like the Sword of Damocles, will fall on him in the event of misbehavior, is led to believe that the Sword of Damocles is, after all, made of rubber, and that perhaps the judge did not mean it when he said, "four and one-half years in prison in the event that you do not reform", it must appear that the effectiveness of the probation expedient, as an instrument of public protection, will be seriously impaired, if not destroyed.

In the instant case no attempt was made to increase the length of sentence. The defendant is no worse off than on his day in court, when he waived his right to appeal and accepted probation. See *United States* v. *Lecato*, 29 F. (2d) 694 (C. C. A. 2d). Whatever has been done has been to his advantage. He has had another chance, which he was unable, or unwilling, to accept. The success of the probation law depends largely upon the certainty of punishment to follow violation.

It seems evident, then, that if probation is not to lose that flexibility of administration which is essential to the proper protection of the public,

that this section of the Act cannot be too literally construed and must be interpreted in such a manner as to reserve to the court the free hand urged for it by so many of the courts which have passed upon the probation law.

IV

THE PETITIONER'S REMEDY WAS BY APPEAL AND NOT BY HABEAS CORPUS

In *Glasgow* v. *Moyer*, 225 U. S. 420, 428, 429, this Court said:

> The writ of *habeas corpus* cannot be made to perform the office of a writ of error. * * * * * * The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of *habeas corpus* cannot be employed to re-try the issues, whether of law, constitutional or other, or of fact.

This principle has been so often stated by this Court as now to be beyond controversy. See *Knewel* v. *Egan*, 268 U. S. 442, 446–447; *McNally* v. *Hill*, 293 U. S. 131, 138; *Jurney* v. *MacCracken*, 294 U. S. 125, 152. The rule applies even though the time within which a review by appeal might have been obtained has expired. *Goto* v. *Lane*, 265 U. S. 393, 402.

On *habeas corpus* the inquiry is simply whether the court whose order or judgment is challenged had jurisdiction. *Knewel* v. *Egan, supra*, p. 445.

That the District Court had jurisdiction of the offense of which the petitioner was indicted and of

his person cannot be questioned. There can, therefore, be no doubt that it had jurisdiction to pronounce the sentence which it imposed on October 10, 1932, and to suspend the execution of that sentence by placing the petitioner on probation. That, as the court below said, the District Court "had continuing jurisdiction after that date of both the case and of the person of appellant [petitioner] in respect to his probation", is equally clear. Section 1 of the Probation Act provides that "The court may revoke or modify any condition of probation, or may change the period of probation", the only limitation being that the period of probation, together with any extension thereof, shall not exceed five years. And Section 2 provides that "At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest." Pursuant to these provisions a warrant was issued for the petitioner's arrest, and at the time the order revoking probation was entered the petitioner was in the custody of the United States Marshal under this warrant. To prevail, it is evident that the petitioner must establish that the jurisdiction otherwise possessed by the District Court became divested because the court did not follow the procedure of bringing the petitioner before him before he revoked his probation. It is not disputed that the District Judge acted upon evidence, and nowhere in the record is

this evidence controverted. Although the order of the District Court remained within the breast of that court during the term at which it was entered, the petitioner made no application to the District Court by motion for rehearing or otherwise to have its order set aside for the purpose of obtaining a hearing, and he allowed the three months' period within which to take an appeal to go by without resorting to that method of review. Such factors may be considered, and even given controlling weight, in determining the propriety of a discharge on habeas corpus. *Salinger* v. *Loisel*, 265 U. S. 224, 231.

That the failure to bring the petitioner before the court before revoking his probation was not jurisdictional, but was a mere irregularity or error of procedure which went only to the question of an abuse of discretion in revoking probation, and not to the question of jurisdiction, is, we think, indicated by the language employed by this Court in the *Burns* case. In that case, which involved the sufficiency of a hearing upon the question whether probation should be revoked, this Court said (pp. 222-223):

> The question, then, in the case of the revocation of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial upon charges. The question is simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles governing the exercise of

judicial discretion. That exercise implies conscientious judgment, not arbitrary action. *The Styria,* 186 U. S. 1, 9. It takes account of the law and the particular circumstances of the case and "is directed by the reason and conscience of the judge to a just result." *Langnes* v. *Green,* 282 U. S. 531, 541. While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice.

The order revoking probation in the *Burns* case was carried to the Circuit Court of Appeals on an appeal, and if that remedy had been resorted to in the instant case, instead of *habeas corpus,* the petitioner would have been in a position to contend that revocation of his probation without a hearing was an arbitrary and capricious act, which could have been remedied by the appellate court, or by this Court on certiorari, by remanding the case with directions that he be granted a hearing. But the petitioner chose not to resort to an appeal, and has, instead, invoked relief through *habeas corpus,* as a consequence of which, as the court below pertinently said, the question presented is not whether there was an abuse of discretion by the District Court, but "whether that court had jurisdiction to make the order of August 5th" revoking probation. As we think that the failure to bring the petitioner before the court was a mere irregularity of procedure, and that it did not render the order of the District Court a nullity, we submit that the peti-

tioner has mistaken his remedy and that he should have resorted to the remedy of an appeal from the order to the Circuit Court of Appeals.

While to permit an appeal from the decision of the committing judge revoking probation might interfere with the summary process so necessary in probation matters, it should be pointed out that not only was this the method employed in the *Burns* case, *supra*, to review an order revoking probation, but also by the Government in *United States* v. *Murray*, *supra*, to review an order granting probation. In *United States* v. *Mulligan*, 48 F. (2d) 93, 94 (C. C. A. 2d), which involved the correctness of an order revoking probation, the court said:

> The act itself has no express restrictions on the power to revoke the probation or to modify the terms, conditions, or time thereof. These are matters for the exercise of a sound judicial discretion. The remedy for an abuse of such discretion or for other irregularities or errors in the exercise of the jurisdiction is solely by appeal, not by writ of habeas corpus. *Craig* v. *Hecht*, 263 U. S. 255, 44 S. Ct. 103, 68 L. Ed. 293.

Appeal was also the remedy resorted to in *Furrow* v. *United States*, 46 F. (2d) 647 (C. C. A. 4th); *Pritchett* v. *United States*, 67 F. (2d) 244 (C. C. A. 4th), and *Dillingham* v. *United States* (C. C. A. 5th), decided March 7, 1935, involving orders revoking probation.

See also *Campbell* v. *Aderhold*, 36 F. (2d) 366, 367 (N. D. Ga.), where the court said:

> The discretion touching the revocation is not vested in the habeas corpus court, but in the trial court. How impractical it would be for this Court to review the merits of the conduct of all the persons in the Atlanta Penitentiary whose probations may have been revoked? The task is declined.

Under no circumstances, we submit, may the petitioner be completely discharged from the sentence which he is now serving. Section 761 R. S. (U. S. C., Title 28, Sec. 461) provides, in connection with *habeas corpus*, that it shall be the duty of the judge granting the writ "to dispose of the party as law and justice require." The petitioner's sentence was unquestionably valid, and if it should be held that he was entitled to a hearing and that the question was properly raised on *habeas corpus*, it is obvious, the probation period not having yet expired, that the most that the petitioner is entitled to is to be carried before the District Judge and accorded a hearing. Cf. *Medley, Petitioner*, 134 U. S. 160; *Tod* v. *Waldman*, 266 U. S. 113. The District Judge would, of course, have no power to change his sentence in the event he revoked the probation, as the term of court at which the sentence was imposed has long since expired. (Judicial Code, Sec. 108 as amended; U. S. C., Title 28, Sec. 189; *United States* v. *Benz*, 282 U. S. 304.)

CONCLUSION

It is respectfully submitted that the trial court had no jurisdiction on habeas corpus to allow the writ, nor was it necessary that petitioner be brought personally before the Texas court before his probation could be revoked.

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

STANLEY REED,
Solicitor General.
SANFORD BATES,
Director, Bureau of Prisons.
A. E. GOTTSHALL,
Attorney.

MAY 1935.

APPENDIX A

THE PROBATION ACT

The Act of Congress establishing the United States Probation System was signed by President Coolidge on March 4, 1925 (c. 521, 43 Stat. 1259). On June 6, 1930, President Hoover signed an Act amending the original by changing the reading of Sections 3 and 4, and adding Sec. 4a (c. 406, 46 Stat. 503), and on June 16, 1933 (c. 97, 48 Stat. 256), Section 2 was amended.

As amended the Act reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,* That the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the Court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify

any condition of probation, or may change the period of probation: *Provided*, That the period of probation, together with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible. (U. S. C., Title 18, Sec. 724.)

SEC. 2. That when directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest, which warrant may be executed by either the probation officer or the United States marshal of either the district in which the probationer was put upon probation or of any district in which the probationer shall be found and, if the probationer shall be so arrested in a district other than that in which he has been put upon probation, any of said officers may return probationer to the district out of which such warrant shall have been issued. Thereupon such probationer shall forthwith be taken before the

court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed. (U. S. C. Sup. VII, Title 18, Sec. 725.)

SEC. 3. The judge or judges of any United States court or courts having original jurisdiction of criminal actions, except in the District of Columbia, may appoint one or more suitable persons to serve as probation officers within the jurisdiction and under the direction of the judge or judges making such appointments or of their successors. All such probation officers shall serve without compensation except that in case it shall appear to any such judge or judges that the needs of the service require that there should be salaried probation officers, such judge or judges may appoint such officers. The Attorney General shall fix the salaries to be paid probation officers and shall provide for the necessary expenses of probation officers, including clerical service, and expenses for traveling when approved by the court. Such judge or judges may in their discretion remove any probation officer serving in their respective courts. The appointment of a probation officer shall be in writing and shall be entered on the records of the court or courts of the judge or judges making such appointment, and a copy of the order of appointment shall be delivered to the officer so appointed and a copy sent to the Attorney General. Whenever such judge or judges

shall have appointed more than one probation officer he or they may designate one of such officers chief probation officer. Such chief probation officer shall direct the work of all probation officers serving in the court or courts of such judge or judges. (U. S. C. Sup. VII, Title 18, Sec. 726.)

SEC. 4. It shall be the duty of a probation officer to investigate any case referred to him for investigation by the court in which he is serving and to report thereon to the court. The probation officer shall furnish to each person released on probation under his supervision a written statement of the conditions of probation and shall instruct him regarding the same. Such officer shall keep informed concerning the conduct and condition of each person on probation under his supervision and shall report thereon to the court placing such person on probation. Such officer shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid persons on probation and to bring about improvements in their conduct and condition. Each officer shall keep records of his work; shall keep accurate and complete accounts of all moneys collected from persons under his supervision; shall give receipts therefor, and shall make at least monthly returns thereof; shall make such reports to the Attorney General as he may at any time require; and shall perform such other duties as the court may direct. Such officer shall perform such duties with respect to persons on parole as the Attorney General shall request. A probation officer shall have the power of arrest that is now exercised by a deputy marshal. (U. S. C. Sup. VII, Title 18, Sec. 727.)

SEC. 4 (a) The Attorney General, or his authorized agent, shall investigate the work of the probation officers and make recommendations concerning the same to the respective judges and shall have access to the records of all probation officers. He shall collect for publication statistical and other information concerning the work of the probation officers. He shall prescribe record forms and statistics to be kept by the probation officers and shall formulate general rules for the proper conduct of the probation work. He shall endeavor by all suitable means to promote the efficient administration of the probation system and the enforcement of the probation laws in all United States courts. He shall incorporate in his annual report a statement concerning the operation of the probation system in such courts. (U. S. C. Sup. VII, Title 18, Sec. 728.)

APPENDIX B

Probation Form 7

Conditions of Probation

DISTRICT COURT OF THE UNITED STATES

------ District of ------

Docket No.

To----------

(Address)----------

In accordance with authority conferred by the United States Probation Law, you have been probationed on this date, , for a period of by the Hon. United States District Judge, sitting in and for this District Court at

It is the order of the Court that you shall comply with the following general and special conditions of probation. The general conditions are as follows: (a) Refrain from the violation of any State and Federal penal laws. (b) Live a clean, honest, and temperate life. (c) Keep good company and good hours. (d) Keep away from all undesirable places. (e) Work regularly. When out of work, notify your Probation Officer at once. (f) Do not leave or remain away from the city or town where you reside without permission of the Probation Officer. Notify your Probation Officer at once if you intend to change your address. (g) Contribute regularly to the support of those for whose support you are legally responsible. (h) Follow the Probation Officer's instructions and advice. The Probation Law gives him authority to instruct and advise you regarding your recreational and

social activities. (i) Report promptly on the dates set forth. If for any unavoidable reason you are unable to do so, communicate with your Probation Officer without delay.

The special conditions ordered by the Court are as follows:

You are hereby advised that under the law the Court may at any time revoke or modify any condition of this probation or change the period of probation. If the Court sees fit, it may discharge you from probation at any time from further supervision, or it may extend your period of probation. You shall be subject to arrest, for cause, upon order of the Court, or without order, for cause, by the Probation Officer. At any time within the period of your probation, or within the maximum period for which you might originally have been sentenced for the offense for which you were convicted, the Court may, if it sees fit, for cause, impose the sentence which it might have imposed in the first instance.

The Court has placed you on probation, believing that if you sincerely endeavor to obey and live up to the conditions of your probation, your attitude and conduct will improve both to the benefit of the United States and to yourself.

You will report as follows:

(Signed) _____

Probationer.

_____

Probation Officer.

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